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No. 96-1395

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents fail to identify a single court, other than the court below, that has in any context recognized a constitutional right to make false statements. They acknowledge, as they must, that this Court has repeatedly refused to recognize any such right. They nevertheless defend the ruling of the court below,

making two principal arguments. First, they contend that this Court's decisions refusing to recognize a constitutional right to make false statements are distinguishable, because those decisions all involved criminal proceedings. Second, they argue that the ruling of the court of appeals extends only to "mere denials" of a charge of employment misconduct, or of the facts underlying such a charge, and that such denials are not false statements.

These contentions are without merit. First, there is no basis in this Court's cases, or in logic, for confining to criminal proceedings the principle that the Constitution confers no right to lie. Second, denials—even "mere denials"—are undoubtedly false statements, and the court of appeals' disposition of the present cases belies respondents' efforts to characterize the court's ruling as narrow.

1. In our opening brief (at 22-25), we cited a dozen cases in which this Court has refused to recognize a constitutional right to make false statements. Although respondents attempt to distinguish these cases on the ground that all involved criminal proceedings, this proposed distinction is unavailing. There are differences between criminal proceedings and federal employee-discipline proceedings, but those differences reflect the far higher stakes that are involved in criminal proceedings. They do not justify creation of a constitutional right to make false statements in the present context.

a. As respondents point out (Erickson Resp. Br. 15-18; Walsh Resp. Br. 13-14), criminal defendants receive procedural protections—including the requirement that the elements of an offense be proved beyond a reasonable doubt—that are not accorded to employees facing possible discipline. These heightened procedural protections flow entirely from the fact that "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970). The Court has refused to provide a constitutional safe harbor for false statements in criminal proceedings, even though defendants face a loss of liberty if their statements are determined to be false. It follows logically that no such safe harbor would be appropriate in employment-discipline proceedings, where what is at stake, though important, is not the "transcending value" of criminal defendants' interest in their liberty. *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

Respondents argue, however, that the heightened procedural protections provided in criminal cases substantially decrease any concern that innocent defendants might be chilled in the exercise of their right to be heard at trial. Such defendants, they contend, can confidently exercise their right to testify, because there is little likelihood that they will inaccurately be found to have made a false statement while doing so. Conversely, they further contend, the absence of such protections in the employment-discipline context means that employees facing possible discipline will be coerced into falsely admitting misconduct, afraid that they might otherwise be incorrectly found to have made false statements.[1] *E.g.*, Erickson Resp. Br. 15-18. This argument is meritless.

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[1] Respondents' argument rests on the premise that the procedural protections accorded to federal employees facing potential discipline are inadequate to protect employees from

First, respondents provide no empirical foundation for their claim that federal employees have been falsely admitting misconduct because they are afraid of erroneous false-statement findings. To the contrary, as we pointed out in our opening brief (at 29), the available evidence suggests that false statements are being insufficiently deterred, not that true statements are being deterred or inaccurately punished.[2] Certainly the six employees involved in the present

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erroneous determinations that they made false statements. *E.g.*, Kye Resp. Br. 10-11. Respondents do not explain, however, how these procedures could be constitutionally adequate to protect employees from erroneous deprivations of their property interest in continued employment, but constitutionally inadequate to protect employees' right to respond to charges of misconduct.

[2] In making this point in our opening brief, we stated that, up until the present cases, the Merit Systems Protection Board (MSPB) had been consistently sustaining the discipline or removal of employees for making false statements during agency investigations into employee misconduct (Pet. Br. 29, 37). Respondent Erickson disputes this, claiming that "the only decision of the MSPB after *Grubka* [v. *Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988)] upholding a charge for falsely denying misconduct is *Greer* v. *United States Postal Service*, [43 M.S.P.R. 180 (1990)]." Erickson Resp. Br. 20-21. Respondent Erickson is mistaken, because the MSPB issued many such decisions after *Grubka*. See, *e.g.*, *Kane* v. *Department of Veterans Affairs*, 46 M.S.P.R. 203, 208-209 (1990); *Hornbuckle* v. *Department of the Army*, 45 M.S.P.R. 50, 53-54 (1990); *Hill* v. *Department of the Army*, 44 M.S.P.R. 607, 611-613 (1990); *Allen* v. *Department of the Air Force*, 43 M.S.P.R. 192, 195-196 (1990); *cf. Sterling* v. *Department of Defense*, 46 M.S.P.R. 177, 185-186 (1990) (administrative law judge's failure to sustain discipline of employee for making false statement was error, but error was harmless because removal of employee was sustained on other grounds).

cases were not deterred from asserting that they did not commit the charged misconduct.

Second, respondents exaggerate the differences between the present cases and those in which the Court has rejected claims of a constitutional right to make false statements. Of particular relevance are the Court's decisions in *United States* v. *Dunnigan*, 507 U.S. 87 (1993), and *United States* v. *Grayson*, 438 U.S. 41 (1978). In both cases, the Court held that it was lawful for judges to consider at sentencing their conclusion that the defendant had testified falsely at trial. Federal employees facing adverse employment action receive procedural protections that are more extensive than those provided to criminal defendants at sentencing.[3] Moreover, consideration of false statements at sentencing can result in a substantial loss of liberty, while such consideration in employment-discipline proceedings can result, at worst, in job loss.

In *Grayson*, this Court dismissed as "entirely frivolous" the assertion that defendants would be deterred from giving truthful testimony by their fear

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[3] A tenured federal employee facing a major adverse employment action has a right to a pre-deprivation hearing, a post-deprivation evidentiary hearing before a neutral administrative judge (at which the employing agency will bear the burden of proof by a preponderance, 5 U.S.C. 7701(c)(1)(B)), and extensive administrative and judicial review. Pet. Br. 17-19. At sentencing, a criminal defendant may be entitled to a hearing to resolve material disputes of fact, and the sentencing judge typically applies the preponderance standard when resolving such disputes. Fed. R. Crim. P. 32(c)(1); *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 comment.). Subsequent judicial review of sentencing determinations is relatively limited. 18 U.S.C. 3742.

of being punished at sentencing. 438 U.S. at 54-55. Because employees facing employment discipline have less at stake and receive more extensive procedural protections, it is even less plausible that they would be inhibited by a fear of erroneous false-statement findings.[4]

b. Respondents note that persons suspected of a crime can refuse to assist the government's investigation into their activities. Erickson Resp. Br. 17; Kye Resp. Br. 11; Walsh Resp. Br. 6. They argue that it would be unfair to deny federal employees suspected of misconduct a correlative right, and that federal employees therefore must be permitted to make false statements about their involvement in employment-related misconduct. *E.g.*, Kye Resp. Br. 11. This argument is fundamentally flawed.

The right to remain silent in the face of government questioning exists only when there is a risk of exposure to criminal penalties. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 67 (1906) ("The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a

[4] Respondent Erickson suggests (Br. 15-16) that criminal defendants have one additional protection that employees facing possible discipline do not: unless the factfinder finds guilt beyond a reasonable doubt on at least one count, criminal defendants will not be sentenced at all, and their false statements at trial cannot be used against them. Very few defendants, however, are likely to be confident that they will be acquitted on all counts. Defendants deciding whether to testify are thus in essentially the same position as employees questioned about allegations of misconduct: both run the risk of adverse consequences if found by a preponderance to have made false statements.

criminal charge."). Where truthful answers would tend to expose the speaker to other forms of injury, including job loss, there is no privilege to remain silent. See, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 430 (1956) (rejecting claim that defendant had Fifth Amendment privilege because truthful answers might lead to "loss of job, expulsion from labor unions, * * * [loss of] passport eligibility, and general public opprobrium"). This is true even if the purpose of the government's questioning is to ascertain whether one of its employees has engaged in employment-related misconduct.[5] See, *e.g.*, *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

Respondents apparently concede that employees can be required to answer questions about employment-related misconduct. Kye Resp. Br. 4; Walsh Resp. Br. 6. They argue, however, that requiring truthful answers would "place the employee in the position of assisting the agency in proving the charges against her while at the same time trying to *defend* against the charges."[6] Kye Resp. Br. 11. Although respon-

[5] In cases in which the alleged misconduct is criminal in nature, employees may have a Fifth Amendment privilege not to answer agency questions about the misconduct, unless they are granted immunity. Pet. Br. 31-32.

[6] As we explained in our opening brief (at 25-26), the false statement charges in the present cases all relate to statements made before any misconduct charges were brought against respondents. Respondent Erickson concedes this (Br. 20), but

dents view this as "irrational and illogical," *ibid.*, it is nothing of the sort. It is, for example, no different from the situation a defendant in a civil suit faces when being deposed. Although such a defendant has a right to defend against the lawsuit, that right does not carry with it the further right to make false statements during the deposition. If truthful answers to the questions posed in a deposition would damage a civil defendant's case—even fatally—the defendant is nevertheless obliged to give them. Although one could say that enforcing this obligation places civil

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he and the other respondents repeatedly obscure the point by, for example, describing the present cases as involving employees who denied "charges" of misconduct. *E.g.*, Erickson Resp. Br. 22; Kye Resp. Br. 10; Walsh Resp. Br. 13. To conform to the facts of the present cases, the statement partially quoted in text should read: "Not allowing the employee to [falsely] deny [involvement in] misconduct would place the employee in the position of assisting the agency in [determining whether she engaged in misconduct] while at the same trying to [preserve her ability to successfully defend herself against charges of misconduct if such charges are ultimately brought]."

More fundamentally, respondents make no effort to explain how they could have a procedural due process right to make false statements during the agency's investigation, a point at which they have no procedural due process right to be heard at all. See Pet. Br. 25-26. Rather, respondents' due process rights did not arise until they were charged with misconduct and falsification, and each thereafter was granted procedural protections that were more than sufficient to meet the requirements of the Due Process Clause. See *id.* at 17-19 (tenured employees charged with misconduct are entitled under the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*, to pre-deprivation opportunity to be heard, post-deprivation evidentiary hearing before administrative judge, and extensive administrative and judicial review).

defendants "in the position of assisting the [plaintiff] in proving the charges against [them] while at the same time trying to *defend* against the charges," *ibid.*, respondents surely would not contend that such enforcement infringes upon the civil defendant's right to be heard or to defend against the lawsuit.[7]

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[7] In this respect, civil defendants and federal employees charged with employment-related misconduct are situated very differently from criminal defendants. Criminal defendants, even if factually guilty, can rest upon their privilege against self-incrimination and require the government to attempt to prove guilt beyond a reasonable doubt without their assistance. Civil defendants and employees charged with employment-related misconduct typically have no such privilege, and can be required to provide truthful information, even if doing so will damage or destroy their chances of success in a civil trial or an administrative proceeding.

Respondents assert that a criminal defendant could not be prosecuted on the ground that his or her plea of not guilty was false. Erickson Resp. Br. 17; Kye Resp. Br. 11. We agree. Cf. *United States* v. *Endo*, 635 F.2d 321, 322-324 (4th Cir. 1980) (defendant who pleaded guilty, withdrew plea, and then pleaded not guilty could not be convicted for making false declarations under 18 U.S.C. 1623; statements that present legal conclusions are considered statements of opinion, rather than factual statements, and cannot be basis for perjury conviction). That principle, however, does not help respondents. This is not a case—nor are we aware of a case—in which a federal employee was disciplined for expressing the opinion that discipline was unwarranted, or for seeking administrative or judicial review of agency discipline. Respondents were disciplined for making specific and factual false statements to their employing agencies, and the fact that a criminal defendant could not be punished for pleading not guilty does not remotely support the conclusion that respondents should be constitutionally immune from employment sanction for their false statements. See *United States* v. *Garcia*, 780 F. Supp. 166, 173 (S.D.N.Y. 1991) (distinguishing *Endo* and holding that

There is nothing inappropriate or "irrational" about requiring employees asked about employment-related misconduct to answer truthfully, even if truthful answers would provide a basis for employment discipline. In fact, it is the contrary rule that is irrational. See *Walsh* v. *Department of Veterans Affairs*, 62 M.S.P.R. 586, 598 (1994) (Erdreich, Chmn., concurring) (granting federal employees constitutional right to make false statements has "the anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully").

Finally, the fact that federal employees are obliged to answer questions about employment-related misconduct, while criminal defendants are free to refuse to answer questions about criminal conduct, does not justify bestowing on federal employees a right to make false statements. This Court's cases make that clear. Cf. *United States* v. *Wong*, 431 U.S. 174, 178 (1977) ("[E]ven the predicament of being forced to chose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury."). See also *United States* v. *Knox*, 396 U.S. 77, 79-84 (1969); *Bryson* v. *United States*, 396 U.S. 64, 67-73 (1969).

2. Respondents claim that the ruling of the court of appeals extends only to "mere denials" of a charge of employment misconduct, or of the facts underlying such a charge, and that such denials are not false statements. Erickson Resp. Br. 12-14; Kye Resp. Br.

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defendant was properly convicted of perjury for having answered "no" to questions about his criminal activities).

7; Walsh Resp. Br. 11-15. Respondents are mistaken on both counts.[8]

a. It is an elementary principle of logic that denials—even "mere denials"—are simply one form of statement. "To deny a statement is to affirm another statement, known as the *negation* or *contradictory* of the first. To deny 'The Taj Mahal is white' is to affirm 'The Taj Mahal is not white.'" W.V. Quine, *Methods of Logic* 9 (3d ed. 1972). To take another example, drawn from a decision of this Court, see *United States* v. *Woodward*, 469 U.S. 105 (1985), a defendant who answers "no" when asked whether he is bringing more than $5,000 into the country makes a "mere denial." In substance, however, that denial is logically equivalent to an assertion that the defendant is bringing $5,000 or less into the country. See 3 *Oxford English Dictionary* 193 (1933) (defining "denial" as "the assertion (of anything) to be untrue or untenable"); *Webster's Third New International Dictionary* 602 (1986) (defining "denial" as "assertion that something alleged is untrue"). In other words, for every denial there is a substantively identical assertion, and the difference between the two types of statement is entirely a matter of form.[9]

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[8] Respondents' arguments on these points are similar in some respects to arguments made in support of the "exculpatory no" doctrine, the validity of which is presently before this Court in *Brogan* v. *United States*, cert. granted, 117 S. Ct. 2430 (1997) (No. 96-1579). See U.S. Brief at 20-22, *Brogan* v. *United States*, *supra*.

[9] Because the difference between denials and assertions is entirely a matter of form, respondents are plainly in error when they suggest that denials are intrinsically incapable of misleading an investigator or delaying an investigation. Walsh Resp. Br. 11; Kye Resp. Br. 7-8. For example, when an agency

b. It would be the purest exaltation of form over substance to make the question whether an employee had a constitutional right to make a false statement turn on the form in which the employee's false statement happened to be uttered.[10] See, *e.g.*, *Board of*

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investigator is seeking to determine which of the agency's employees engaged in particular misconduct, one employee's false "mere denial" can quite easily mislead the investigator or delay the investigation.

Respondents also advance a variety of specific arguments as to why their particular false statements were not intended to, and did not in fact, mislead investigators or delay investigations. Kye Resp. Br. 8; Walsh Resp. Br. 12-13. These contentions are entirely unconvincing. There can be no question that respondents' false statements were intended to affect the course of the misconduct investigations, even if only by making it less likely that they would be found to have committed misconduct. See, *e.g.*, McManus Initial Decision 5 (No. AT-0752-94-0313-I-1) (MSPB May 26, 1994) (McManus admitted that in his original interview he "'may have skirted the issue' in an attempt to end the investigation"). Perhaps because proof of successful deception is not required under federal employment law, cf. *Naekel* v. *Department of Transp.*, 782 F.2d 975, 977-978 (Fed. Cir. 1986) (requiring proof of intent to deceive, not successful deception), the record contains very little direct information on the question whether respondents' false statements actually succeeded in deceiving investigators or delaying investigations. There are some indications, however, that respondents' false statements did mislead investigators or delay investigations. See, *e.g.*, Kye Initial Decision 2-6 (No. PH-0752-93-0524-I-1) (MSPB Nov. 12, 1993) (after respondent Kye denied misconduct in first interview, agency investigator conducted two additional interviews with her, one six days later); Pet. App. 25a-26a (after respondent McManus denied misconduct in first interview, agency investigator conducted additional interview with him three weeks later).

[10] If the form of the answer were dispositive, employing agencies would presumably attempt to ask their questions so that any false answer would likely be in the form of an assertion rather than a denial: rather than asking, "Did you build a pond for your supervisor during duty hours?", they would ask "Did you devote your entire workday to performing official duties?" Clever employees might react by trying to ensure that all of their answers took the form of denials rather than assertions: rather than answering the latter question by saying, "Yes, I performed only official duties," they might respond, "I did not spend time during the workday on matters other than official work." The question whether an employee has a constitutional right to make a false statement could not conceivably depend on the outcome of this entirely formalistic struggle.

County Comm'rs v. *Umbehr*, 116 S. Ct. 2342, 2349 (1996) ("In determining what is due process of law regard must be had to substance, not to form.") (quoting *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 235 (1897)). The court of appeals' disposition of the cases before it demonstrates as much. Although the court professed to limit its ruling to false denials, it refused to sustain the imposition of discipline as to statements that were indisputably couched as assertions. For example, respondent Kye's false claims that she had lost or destroyed the government credit card at issue were clearly in the form of assertions rather than denials. Pet. Br. 7. The court of appeals, however, refused to permit Kye to be disciplined for making those false assertions, because they were "in effect" denials. Pet. App. 23a. As we have already noted, all assertions are "in effect" denials (and vice versa). A rule that extends not only to denials but also to assertions that are "in effect" denials is a rule that is not limited at all.

The court of appeals also suggested that the right to make false statements would not extend to "false stor[ies]" or "tall tales." Pet. App. 17a. It is anyone's

guess, however, when or how a false statement becomes a false story. One might speculate that the length and the level of detail of the false statement would be significant factors, but the court of appeals' rulings in the present cases clearly reflect its view that even rather detailed false scenarios are not "false stor[ies]." For example, in any natural sense of the phrase, respondent Kye clearly told a "false story" when she falsely claimed that she had lost her government credit card, had regained possession of it, and had subsequently torn it up, and when she suggested she suspected her son was responsible for the misuse of the card. Pet. Br. 7; Kye Initial Decision 4-6. Nevertheless, the court of appeals held that Kye could not be disciplined for telling that false story. Pet. App. 23a. There is little reason to suppose that any meaningful limit would be imposed by the purported exclusion of "false stories" from the constitutional right to make false statements created by the court of appeals.[11]

The ruling of the court of appeals creates a broad right to lie for federal employees, and will seriously interfere with the ability of the federal government to investigate allegations of employee misconduct and to ensure the integrity of the federal civil service. Left

[11] As we explained in our opening brief (at 20-22), although the court of appeals identified other limitations on the scope of its ruling, none are at all reassuring. For example, all of the false statement charges at issue in the present cases related to statements that were made during agency investigations and before any charges were brought, which renders inexplicable the court of appeals' statement that employees would remain subject to discipline for false statements made in such circumstances. Respondents do not even acknowledge this discrepancy, much less attempt to explain or justify it.

undisturbed, the ruling of the court of appeals would call into question the constitutionality of other important disciplinary systems, including state civil-service systems and the system of attorney discipline.[12] Finally, the ruling of the court of appeals is contrary to this Court's consistent rejection of claims that the Constitution confers a right to lie.

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For the foregoing reasons, and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General

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[12] Respondents suggest that this observation exceeds the scope of the question presented. Erickson Resp. Br. 22-23; Kye Resp. Br. 16-17. To the contrary, when deciding specific questions, this Court routinely considers the implications that its ruling might have in other contexts. See, *e.g.*, *Williams* v. *United States*, 458 U.S. 279, 286 (1982) ("While the Court of Appeals addressed itself only to check kiting, its ruling has wider implications.").